No. 86-421

In The
# Supreme Court of the United States
October Term, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, et al.,
*Appellants,*

v.

ROTARY CLUB OF DUARTE, et al.,
*Appellees.*

**Appeal from the Court of Appeal of the State of California Second Appellate District**

## BRIEF OF INTERVENOR STATE OF CALIFORNIA

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## QUESTIONS PRESENTED

1. Does Rotary International timely raise any substantial constitutional questions which were not answered by this Court's decision in *Roberts v. United States Jaycees*?

2. Is any constitutionally protected right of association violated when the Unruh Civil Rights Act, California Civil Code section 51, is construed as prohibiting Rotary International from expelling or otherwise penalizing Rotary Club of Duarte because the latter chooses to admit women as members?

3. Is the Unruh Civil Rights Act, as construed, unconstitutionally vague or overbroad?

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## OPINIONS BELOW

Intervenor State of California agrees with appellants' statement as to the opinions below.

## JURISDICTION

Appellants Board of Directors of Rotary International, et al., (Rotary International) invoke the jurisdiction of this Court pursuant to 28 United States Code sections 1257(2) and 2101(c). Appellees Rotary Club of Duarte,

et al., (Duarte) moved to dismiss or affirm on the grounds that the appeal timely presents no substantial federal question, and the State of California filed a brief as amicus curiae in support of Duarte's motion. This Court's order of November 3, 1986, postponed consideration of the jurisdictional question until the case is heard on the merits.

This appeal seeks to raise two federal questions: first, whether the California decision violates Rotary International's freedom of association, and, second, whether the Unruh Civil Rights Act, California Civil Code section 51, (Unruh) is unconstitutionally vague and overbroad. Neither question merits the full attention of this Court. The California Court of Appeal considered appellants' freedom of association claims and construed and applied Unruh in a manner fully consistent with this Court's recent opinion in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), which establishes the guidelines for constitutionally protected freedom of association. Furthermore, the second issue as to the purported vagueness and overbreadth of Unruh was not timely presented below. In any event, the second issue is also not substantial. Unruh, as construed by California courts, offends no constitutional guarantees; no basis exists to declare the state statute unconstitutional.

**Appellants' Federal Claims Are Not Substantial**

A substantial federal question must, of course, exist in order for this Court to devote its full attention to reviewing the decision below either by appeal or on writ of certiorari. As this Court explained in *Zucht v. King*, 260 U.S. 174, 176 (1922):

> "[I]t is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character."

See also *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902); U.S. Sup. Ct. R. 15.1(h), 16.1(b) and (c), and 17.1(c). The Court grants motions to dismiss appeals from state courts where "[i]n the light of our previous decisions, appellants have failed to raise any substantial federal questions. . . ." (*Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390, 391 (1952).)

As discussed more fully below, *Jaycees* disposes of appellants' constitutional claims. While freedom of association protects "intimate human relationships," *Jaycees*, 468 U.S. at 617, Rotary International, representing over 900,000 members, like the 295,000 member United States Jaycees, is clearly "outside of the category of relationships worthy of this kind of constitutional protection." (*Id.*, at 620.) Freedom of expressive association is likewise not implicated because, as in *Jaycees*, there is "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." (*Id.*, at 627.)

Appellants' contention that Unruh is unconstitutionally vague and overbroad is similarly answered by the Court's reasoning in *Jaycees*. California courts, like Minnesota courts, have construed state law so as to avoid any constitutional problems. As explained in *Jaycees*, the "construction of the Act . . . ensures that the reach of the statute is readily ascertainable" (*id.*, at 630), and "does not create an unacceptable risk of application to a substantial amount of protected conduct" (*id.*, at 631.)

Since appellants' federal claims are identical to those addressed in *Jaycees*, and since the United States Jaycees

and Rotary International are virtually indistinguishable as to the pertinent qualities and characteristics identified as significant in *Jaycees*, no reason exists for this Court to devote its full attention to the merits of this appeal. The *Jaycees* decision, issued just two and a half years ago without any dissent, disposes of appellants' constitutional concerns.

**Appellants' Vagueness and Overbreadth Claims Are Not Timely**

Throughout the proceedings which resulted in the decision under review herein, appellants' federal claims concerned freedom of association, and the court below ruled that "application of the Unruh Act to International does not abridge its freedom of intimate or expressive association." (App. to Juris. Statement C-38.) While appellants also argued that Unruh did not apply to Rotary International, an argument with which the trial court agreed (App. to Juris. Statement B-8 - B-9) but which the California Court of Appeal conclusively rejected (App. to Juris. Statement C-22 and C-28 - C-29), they did not directly challenge the statute itself as unconstitutionally vague or overbroad.[1] The Court of Appeal consequently did not address any such claim. Appellants' Petition for Rehearing to the Court of

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1. Appellants' Brief in Opposition to Motion to Dismiss, 3-4, refers to a section of their brief below which argued not that Unruh is unconstitutionally vague or overbroad, but that California courts have construed Unruh not to apply to organizations like Rotary International in order to protect freedom of association. At best, the issues of vagueness and overbreadth were merely suggested as possible reasons for a limited construction of Unruh which would exclude coverage of Rotary International.

Appeal argued directly, for the first time, that Unruh was an unconstitutional statute because of vagueness and overbreadth. (Pet. for Reh., 29-36.) However, generally California courts will not "consider points on rehearing not previously raised . . . ." (*County of Imperial v. McDougal*, 19 Cal.3d 505, 513 (1977).)

Appellants' failure to assert in a timely manner that Unruh itself is unconstitutionally vague and overbroad precludes review of those issues by this Court. As explained in *Webb v. Webb*, 451 U.S. 493, 496-497 (1981):

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."

See also U.S. Sup. Ct. R. 15.1(g), 16.1(b), and 21.1(h).

The Court of Appeal's failure to address these issues supports Duarte's claim that this Court lacks jurisdiction to decide these questions. As this Court stated in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), in refusing to consider a federal preemption claim:

> "[W]e conclude that we have no jurisdiction to consider this contention. The decision below does not discuss this issue, and when ' "the highest state court has failed to pass upon a federal question, it will be presumed that the omission was due to want of proper presentation in the state courts, . . . " '[citations omitted]."

See also *Webb v. Webb*, 451 U.S. at 495.

If this Court finds that the instant case does raise substantial federal questions, and assuming, arguendo, it finds that freedom of association precludes Unruh's application

to Rotary International, it nevertheless should limit its review to the particular facts herein and refuse to consider appellants' wholesale attack on U.S. law.

## CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional provisions and statutes specified by appellants, this case involves Article I, Section 8, of the California Constitution, which provides:

> "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."

## STATEMENT OF THE CASE

This case arose because the Rotarians who belong to the Rotary Club of Duarte decided to admit women as members of their local club. (App. to Juris. Statement F-4.) The membership restrictions of Rotary International do not permit women to be members of local clubs[2], and proposals to eliminate the male-only constitutional provision have been rejected. (*Ibid.*) Rotary International, a worldwide association of nearly 20,000 local Rotary Clubs, representing over 900,000 local club members (App. to Juris.

2. Article IV, Section 3(a), of the Constitution of Rotary International provides that "[a] Rotary Club shall be composed of men . . . ." (J.A. 6 and 11.)

Statement F-2), expelled Duarte from the association (App. to Juris. Statement F-5.)

**Procedural Posture**

The Rotary Club of Duarte and its female members sued the Board of Directors of Rotary International, alleging that Duarte's expulsion was in violation of Unruh and Article I, Section 8, of the California Constitution. (J.A. 1-9.) The Superior Court of California ruled in favor of Rotary International. (App. to Juris. Statement A and B.) This decision was reversed on appeal. (*Rotary Club of Duarte v. Board of Directors of Rotary International*, 178 Cal.App.3d 1035 (1986), reprinted as App. to Juris. Statement C.) The California Supreme Court denied review. (App. to Juris. Statement D.)

The California Court of Appeal determined that Unruh[3] prohibits Rotary International and Duarte from excluding from or terminating membership arbitrarily on the basis of sex. (App. to Juris. Statement C-29.) This decision as to state law and the state court's construction of Unruh are, of course, conclusive. (*Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, — U.S. — [106 S.Ct. 2968, 2976] (1986); *Austin v. Boston*, 74 U.S. 694, 698 (1868).)

The California Court of Appeal also determined that constitutional protection for freedom of association did not prevent California from prohibiting the enforcement of

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3. The Unruh Civil Rights Act, California Civil Code section 51, provides, in pertinent part, that "[a]ll persons . . . no matter what their sex . . . are entitled to the full and equal . . . advantages, . . . privileges, or services in all business establishments of every kind whatsoever."

Rotary International's discriminatory membership policies against Rotary Club of Duarte. (App. to Juris. Statement C-36, C-38.)

An appeal to this Court was filed, and a motion to dismiss or affirm. On November 3, 1986, the Court postponed consideration of the jurisdictional question until the case is heard on the merits. On December 15, 1986, this Court granted California leave to intervene as a party.

**Material Facts**

Rotary International's male-only tradition reflects an anachronistic vision of business and professional activities, at least in California. As described by Herbert A. Pigman, the General Secretary of Rotary International:

> "There is a historical basis for the male only provision. It was founded in 1905 on the basis that this would be an organization of service comprising business and professional leaders. In the society of America, in that era, there were very, very few women in positions of business and professional leadership at that time." (App. to Juris. Statement G-51.)

This situation has unmistakably changed in much of today's world, and has certainly changed in California, but Rotary International has refused to permit its membership policies to be modified correspondingly.[4] While Rotary International still describes itself as "a cross-section of [a community's] business and professional life" (Exh. C

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4. While women still are excluded as members, "ladies committees or other associations composed of women relatives of Rotarians" are permitted. (Exh. A-3 to Pigman Deposition, Excerpts from Rotary Manual of Procedure, 47, J.A. 44.) See also *id.*, 156, J.A. 68.

to Pigman Deposition, Excerpt from Rotary Extension Manual, J.A. 96), the "cross-section" is now greatly askew.

The original motivation for the formation of Rotary International was "to produce increased business for each member." (Exh. B to Pigman deposition, Excerpts from Rotary Basic Library, Vol. 1, *Focus on Rotary,* 1-2, J.A. 80.) For example, in 1915, a business promotion committee of the first local Rotary Club calculated that an estimated "$1,750,000 worth of business was exchanged among the club's 265 members!" (*Id.,* Vol. 3, *Vocational Service,* 33-34, J.A. 93.)

This candid assessment of the business advantages for Rotarians is now cloaked by the mottoes of "Service Above Self" and "He Profits Most Who Serves Best." (Exh. A-3 to Pigman Deposition, Excerpts from Rotary Manual of Procedure, 157, J.A. 69.) The official purpose of Rotary International is to "provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." (*Id.,* 7, J.A. 35.)

It is undisputed that Rotarians do perform valuable community service, but it is also true that Rotarians continue to benefit in their business and professional lives due to their status as Rotarians. As described in a Rotary booklet, "Business Relations Conferences," (Exh. 9, J.A. 14):

> "One of the most satisfying vocational service programs for the Rotarian is the business relations conference. The Rotarian learns management techniques that help improve his own business or professional skills."

Among the recommended vocational service projects for local clubs to undertake are career conferences, pro-

grams to provide business expertise to small businesses, and group discussions on topics such as employer-employee and buyer-seller relations. (Exh. 10, Rotary booklet, "What Can We Do in Vocational Service," J.A. 28-29.) Rotary International recommends that each local club establish committees to give "confidential business advice and assistance to Rotarians" and to discuss "problems which are primarily of an economic nature." (Exh. A-3, 38, J.A. 40.) International conferences also permit Rotarians to "share ideas and fellowship with other Rotarians from all over the world in the same related business and professional fields." (Exh. B, 38-39, J.A. 83.)

A former treasurer of a local Rotary Club estimated that 95 percent of members' dues were paid by their companies or businesses as legitimate business expenses. (Stip. regarding Testimony of Dr. Jacob Frankel, J.A. 34.) Dr. Frankel, president of California State College, Bakersfield, considered Rotary membership essential for his fund raising work, and encouraged his cabinet members, all of whom were male, to become Rotarians. (J.A. 34.) An additional example of the business benefits of membership is the official directory of hotels owned or operated by Rotarians "for the convenience of Rotarians who travel . . . ." (Exh. A-3, 171, J.A. 75.)

Rotary International, itself, operates as a large-scale business. The General Secretary supervises a staff of approximately 300 persons in offices in six countries. (Exh. A-3, 14, J.A. 36.) It receives annual dues of $17.00 for each of the approximately 900,000 Rotarians. (Exh. A-3, 104, J.A. 56.) It sells magazine subscriptions to members (*ibid.*, J.A. 57), and solicits paid advertising for its offi-

cial magazine (*id.*, 169-170, J.A. 74). Revenue is also received from conference fees, charter fees, license fees, royalty payments, and investments. (*Id.*, 104, J.A. 56; *id.*, 150, J.A. 67.)

Rotary International is an association of nearly 20,000 local clubs, not individual Rotarians, and the over 900,000 Rotarians are actually members of local clubs averaging 50 members each but ranging in size "from fewer than 20 to more than 900." (Pigman Deposition, App. to Juris. Statement G-15.) While a weekly meeting attendance rate of 60 percent is mandatory (*id.*, G-23), those in attendance at local club meetings are frequently not members of the local clubs. Rotarians commonly attend meetings of other nearby local clubs, as well as clubs around the world, and visitors from other Rotary clubs may number "in the tens and twenties each week." (*Id.*, G-23 - G-24.) Joint meetings may be held with other service clubs. (Exh. A-3, 36, J.A. 39, and *id.*, 44, J.A. 42.) Non-Rotarian guests at meetings may include "employees, competitors, customers, and salesmen." (Exh. 10, J.A. 25), and other "non-Rotarian members of the community." (Exh. A-3, 35, J.A. 39), especially prospective members (*id.*, 143, J.A. 66, and Exh. B, 44, J.A. 89.) Favored guests are "non-Rotarian businessmen" (Exh. 9, J.A. 14); students (Exh. A-3, 122, J.A. 60, and *id.*, 146, 67); members of the news media (*id.*, 166-168, J.A. 72); and representatives of labor and employer organizations (*id.*, 233, J.A. 78.)

As a final matter, while Rotarians are united in their interest in community service, this unity does not extend to the establishment of a single set of ideas or ideals to

which all Rotarians must adhere. As stated in the Rotary Basic Library:

> "[T]hroughout the years there has been no attempt to create a single R.I. 'corporate image.' And this has been another source of Rotary's strength, for it permits worldwide diversity within an overall unity, minimizing the potential for conflict and maximizing the thrust toward harmony among clubs and Rotarians of different nations and cultures." (Exh. B, J.A. 82.)

Rotarians are tolerant and respectful of other cultures and religions (*id.*, J.A. 85), and in the interest of advancing fellowship and good-will, local clubs are advised, when discussing controversial public questions, to ensure "that both sides be adequately represented." (Exh. A-3, 115. J.A. 58.)

As Rotary International describes itself:

> "Every Rotary Club must have its windows and doors open to the whole world. Rotary membership offers rich opportunities for growth in international understanding and goodwill to the ordinary business and professional man in any community, large or small, in almost 160 countries. In fact, there are many men who have Rotary to thank for opportunities which otherwise never would have come their way. . . ." (Exh. B, J.A. 85.)

California's interest in this case is to ensure that women, as well as men, may share in these opportunities, so that women will not be denied business advantages or participation in enterprises affected with a public interest because of their sex, in violation of Unruh, and so that women will not be disqualified from pursuing business be-

cause of their sex, in violation of Article 1, Section 8, of the California Constitution.

## SUMMARY OF ARGUMENT

The California Court of Appeal properly considered and rejected appellants' constitutional objections to the application of Unruh to Rotary International's discriminatory membership practices. California has a long tradition of prohibiting sex discrimination by all enterprises "affected with a public interest." (*In re Cox*, 3 Cal.3d 205, 212 (1970).) Common law doctrine has now been codified in Unruh. In addition, Article 1, section 8, of the California Constitution expressly provides that sex discrimination shall not be permitted to prevent persons from pursuing businesses or professions. California's concern for guaranteeing all persons, regardless of their gender, equal opportunity in business activities is long-standing and compelling.

The facts of the instant case show that Rotary International may not justify its discriminatory practices by professing constitutional immunity from state regulation. *Jaycees* disposes of any claim that constitutional protection for freedom of association exempts Rotary International from Unruh.

Freedom of association rights may be implicated if the government seeks to interfere either with "intimate human relationships" (*Jaycees*, 468 U.S. at 617), or with "collective effort on behalf of shared goals" (*id.*, at 622). Neither

aspect of constitutionally protected associational rights is endangered by the decision below. Regarding the right of intimate association, Rotary International, like United States Jaycees, is clearly "outside of the category of relationships worthy of this kind of constitutional protection" (*id.*, at 620). If 295,000 Jaycees are "not 'private' in any meaningful sense of that term" (*id.*, at 631, O'Connor, J., concurring), then neither are 900,000 Rotarians.

Freedom of expressive association is also not implicated since the presence of female members would in no way interfere with "the ability of the original members to express only those views that brought them together." (*Jaycees,* at 623.) Rotarian public service activities are not related in any way whatsoever to any male-only membership requirement, and neither the purpose nor the expression of the preferred views of Rotary International will be impeded by female members.

Rotary International's claim that Unruh is unconstitutionally value and overbroad is also disposed of in *Jaycees,* to the extent this claim raises any legitimate concerns. This Court recognized that "the Minnesota court's construction of the Act by use of . . . familiar standards ensures that the reach of the statute is readily ascertainable" (*id.*, at 630), and that "the Act, as currently construed, does not create an unacceptable risk of application to a substantial amount of protected conduct" (*id.*, at 631). California courts, like those of Minnesota, have ensured that the statute satisfies all constitutional requirements.

In sum, this case, like *Jaycees,* exemplifies the authority of a state to enact an equal access law which "protects the State's citizenry from a number of serious social and

personal harms." (*Jaycees*, 468 U.S. at 625.) While California's legislation imposes non-discrimination requirements which exceed those of federal law, the State's commitment to equal opportunity is constitutionally sound. The decision below should therefore be affirmed.

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## ARGUMENT

### I. CALIFORNIA IS STRONGLY COMMITTED TO THE GUARANTEE OF EQUAL ACCESS TO BUSINESS OPPORTUNITIES AND PUBLIC INTEREST ENTERPRISES.

California's Unruh Civil Rights Act evidences this State's firm belief that discrimination in access to economic advantages and opportunities and to enterprises affected with a public interest offends public policy. (*Koire v. Metro Car Wash*, 40 Cal.3d 24, 36 (1985); *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721, 738 (1982), cert. denied 459 U.S. 858; and *In re Cox*, 3 Cal.3d 205, 212 and 215 (1970).) The State's commitment to eradicating gender discrimination is particularly strong, "[c]onsidering this state's special constitutional sensitivity to sexual discrimination [citations omitted]." (*Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 85-86 (1985).) "Public policy in California strongly supports eradication of discrimination based on sex." (*Koire*, 40 Cal.3d at 36.)

California led the nation in recognizing that "[w]omen, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities." (*Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 19 (1971).) Former Article XX,

section 18, of the California Constitution, adopted May 7, 1879, provided:

> "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession."

The California Supreme Court was quick to describe this section as "considerations of policy, the determination of which belonged to the convention framing and the people adopting the Constitution; . . . " (*Matter of Maguire*, 57 Cal.604, 608 (1881).) See also *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d at 8. The "explicit and unqualified language" (*ibid.*), now found in Article 1, Section 8, of the California Constitution, establishes the constitutional right to freedom from sex discrimination in pursuing business opportunities.

Both common law and statutory law supplement this constitutional guarantee and reinforce California's firm commitment to the elimination of discriminatory practices by enterprises affected with a public interest. Unruh, the state statute at issue in the instant case, was enacted substantially in its present form in 1959 (Cal. Stats. 1959, ch. 1866, § 1, p. 4424)[5], but as the California Supreme Court has often explained, Unruh and its predecessor statutes are legislative codifications of a common law doctrine forbidding all arbitrary discrimination by enterprises affected with a public interest. (*Marina Point*, 30 Cal.3d at 738.) See also *Isbister*, 40 Cal.3d at 78-79); *Gay Law Students*

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5. The express prohibition of discrimination on the basis of sex was added to Unruh in 1974. (Cal. Stats. 1974, ch. 1193, § 1, p. 2568.)

*Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458, 489-490 (1979); and *In re Cox*, 3 Cal.3d at 212.

Furthermore, California's common law doctrine prohibiting arbitrary discrimination and its civil rights statute have always extended to discrimination by private organizations. (*James v. Marinship Corp.*, 25 Cal.2d 721, 740 (1944).) As explained in one of the earliest reviews of Unruh:

> "The Legislature in the exercise of the police power may in appropriate circumstances prohibit private persons or organizations from violating this policy." (*Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 471 (1962).)

As this Court recognized in *Jaycees*, federal anti-discrimination statutes were generally not available to address private discrimination until recent years, and the regulation of discriminatory practices by private groups or individuals was left primarily to the states.

> "[State] laws provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field in 1957." (*Jaycees*, 468 U.S. at 624.)

Unruh, and its predecessor statutes and common law doctrine, are clearly included among such state laws. As was stated in 1920, when segregated seats in theaters were held to violate former California Civil Code section 51, and the California statute was compared to civil rights laws in other states:

> "There is no doubt as to where the weight of authority lies on this point. It upholds such statutes, and also holds that conduct such as that of the de-

fendants toward plaintiff constitutes a discrimination against the negro on account of his color and race in violation of his rights under such Civil Rights Bills." (*Jones v. Kehrlein*, 49 Cal.App. 646, 650-651 (1920).)

California is thus firmly committed to protecting civil rights and prohibiting private discrimination which adversely affects society as well as the individual victims of discrimination. The decision below carries forth that compelling public interest.

## II. CONSTITUTIONAL PROTECTION FOR FREEDOM OF ASSOCIATION DOES NOT EXCUSE ROTARY INTERNATIONAL'S DISCRIMINATION.

As this Court has reaffirmed on numerous occasions:

> "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." (*Norwood v. Harrison*, 413 U.S. 455, 470 (1973).)

See also *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); and *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93-94 (1945). Private discrimination, standing alone, is neither valued nor proscribed by the federal constitution. (*Norwood v. Harrison*, 413 U.S. at 469-470.)

Other constitutional protections may, however, be implicated if a state seeks to prohibit private discrimination. As this Court explained in rejecting constitutional challenges to Minnesota's regulation of the discriminatory membership of the United States Jaycees, constitutionally protected associational rights include both freedom of in-

timate association and freedom of expressive association. (*Jaycees*, 468 U.S. at 617-618.) Neither aspect of constitutionally protected freedom of association is jeopardized in the instant case.

### A. Freedom Of Intimate Association Does Not Protect An Organization With A Large And Shifting Membership Which Unites For Purposes Of Public Service And/Or Business Advantage.

Freedom of intimate association is constitutionally protected "as a fundamental element of personal liberty." (*Jaycees*, 468 U.S. at 618.) Using descriptive terms such as "most intimate" and "highly personal," this Court explained that personal affiliations which are undoubtedly entitled to constitutional protection are those related to family, marriage, children, and cohabitation. (*Jaycees*, 468 U.S. at 619-620.) The Court further explained that the protection to be accorded any particular association "unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." (*Id.*, at 620.) The relevant factors to consider include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." (*Ibid.*)

Applying these factors in the instant case, and comparing Rotarians to Jaycees, leads to the conclusion that Rotary International, like United States Jaycees, lacks the requisite degree of intimacy necessary to claim constitutional immunity from state regulation pursuant to personal liberty. Size alone appears determinative, since

Rotary International is three times the size of United States Jaycees. Furthermore, while local clubs vary greatly in size, local affiliation does not represent any exclusivity in relationships, since members of other local clubs and even non-Rotarians frequently participate in local club activities. Membership is selective, but the selectivity is primarily along business and professional classifications, not personal affiliations. And, as a final consideration, whether the purpose of Rotary membership is for public service or business advantage, neither of these purposes require sanctuary from state regulation of discriminatory membership policies. Legitimate privacy interests are simply not at issue.

### B. Freedom Of Expressive Association Does Not Protect An Organization's Exclusionary Practices Where The Basis For Exclusion Is Unrelated To The Group's Shared Goals.

Freedom of expressive association is constitutionally protected "as implicit in the right to engage in activities protected by the First Amendment . . . ." (*Jaycees*, 468 U.S. at 622.) Absent any compelling state interest, a state may not "impair the ability of the original members to express only those views that brought them together." (*Id.*, at 623.)

In the instant case, if Rotarians join merely to participate in community service, a requirement that women not be excluded as members has absolutely no effect on the ability of Rotarians to accomplish their shared goal of community service or to express any shared views. And if the goal is viewed as developing a network among community leaders, then California's compelling interest in

eliminating the societal, political, and economic harm caused by sex discrimination vastly outweighs any infringement of First Amendment rights.

As in *Jaycees*, there is simply no showing that female members "will change the content or impact of the organization's speech." (*Jaycees*, 468 U.S. at 628.)[6] To the contrary, since Rotary International has already established procedures to ensure that diverse viewpoints and cultures among members are respected and tolerated, not discouraged, there can be no legitimate claim that the mere presence of women members, or any varied viewpoints such women may either espouse or engender, would alter the group's philosophy.

Furthermore, just as the Minnesota statute at issue in *Jaycees* "imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members" (*id.*, at 627), membership organizations in California are not compelled by Unruh to admit persons whose interests are not consistent with those of the group. As explained in *James v. Marinship Corp.*, 25 Cal.2d 721 (1944), where a union not permitted to exclude black members argued that California law would destroy the union by forcing it to admit all persons to membership, including those with inimical interests:

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6. Given California's compelling interest in eradicating sex discrimination, those seeking to defend discriminatory practices as necessary to protect freedom of expressive association must demonstrate "the Act imposes any serious burdens on the male members' freedom of expressive association." (*Jaycees*, 468 U.S. at 626.) See also *Hishon*, 467 U.S. at 78.

> "The right of the union to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union [citations omitted] affords it an effective remedy against such persons." (*Id.*, at 736.)

Rotary International may similarly require that all Rotarians, male and female, share in the group's community service philosophy and activities.

Even assuming, arguendo, that eliminating the categorical exclusion of women may infringe, to some degree, upon the Rotarians' protected freedom of expression, "that effect is no greater than is necessary to accomplish the State's legitimate purposes." (*Jaycees*, 468 U.S. at 628.) Since the purpose of Unruh is not to suppress free speech, but to further California's compelling interest in eliminating arbitrary discrimination, the application of Unruh in the instant case does not violate the freedom of expressive association described in the majority opinion in *Jaycees*.

In her concurring opinion in *Jaycees*, Justice O'Connor proffered an alternative standard for ensuring protection of First Amendment concerns, drawing a distinction between commercial and expressive activity. According to her proposed test:

> "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy . . . ." (*Jaycees*, 468 U.S. at 636.) (O'Connor, J., concurring.)

Applying this standard in the instant case also leads to the conclusion that First Amendment rights are not

jeopardized by requiring the admission of women as members. Rotary International, with its staff of 300, its annual revenue of over $15,000,000 from membership and additional revenue from other sources, and its emphasis on developing business and professional skills among its members, is certainly in the commercial marketplace to a substantial degree.

Whichever standard is used for measuring First Amendment concerns, Rotary International's activities and philosophy either fall outside the area of protection, or are only minimally affected as compared with the state's overriding interest in promoting equal opportunity in all enterprises affected with a public interest.

## III. UNRUH, AS CONSTRUED BY CALIFORNIA COURTS, IS NEITHER UNCONSTITUTIONALLY VAGUE NOR OVERBROAD.

Appellants contend that Unruh is unconstitutionally vague and overbroad,[7] but a review of California court decisions demonstrates that Unruh has been carefully construed so as to avoid constitutional infirmities. Since court decisions provide definition and limitation to Unruh, no basis exists to declare the state statute unconstitutional.

The doctrines of overbreadth and void-for-vagueness are both concerned with the chilling effect a statute may have upon lawful conduct. Overbreadth analysis involves claims that a "statute's very existence may cause others

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7. Appellees, joined by the State of California, of course assert that this Court lacks jurisdiction to review this contention. See jurisdictional discussion above, pages 1-6.

not before the court to refrain from constitutionally protected speech or expression." (*Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).) Vagueness claims allege that a statute fails to give adequate notice of prohibited conduct. (*Id.*, at 607.) Neither doctrine justifies the invalidation of a state statute where, as here, the conduct in question is clearly prohibited by the statute, and state court decisions have adopted "limiting constructions" and "commonly used and sufficiently precise standards." (*Jaycees*, 468 U.S. at 631.)

### A. California Court Decisions Give Definite Content to Unruh's Prohibition of Arbitrary Discrimination By All Business Enterprises.

Appellants contend that Unruh is unconstitutionally vague in two respects.[8] First, appellants argue that the ban on arbitrary discrimination is not an intelligible standard. (Appellant's Brief, 40-41.) Appellants also claim that the phrase "all business establishments of every kind whatsoever" is not sufficiently certain. (*Id.*, at 43-45.) Appellants are wrong on both claims.

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8. Appellants also confuse a "void-for-vagueness" argument with a so-called "choice of law" question. (Appellants' Brief, p. 45.) This issue is scarcely worthy of discussion. A state may unquestionably use its police power to regulate conduct in the state which offends the public policy of that state, whether or not such conduct is lawful in other states. (*Travelers Health Assn. v. Virginia*, 339 U.S. 643, 650 (1950); *Pacific Ins. Co. v. Comm'n.*, 306 U.S. 493, 503 (1939).)

### 1. Appellants May Not Challenge Unruh's Prohibition Of All Arbitrary Discrimination.

Appellants argue at some length that California court decisions interpreting Unruh as prohibiting all arbitrary discrimination render the state statute unconstitutionally vague because the term "arbitrary" is not an intelligible standard. Unruh, on its face, expressly prohibits discrimination on six enumerated bases, including sex, but this list of expressly prohibited bases of discrimination has been interpreted as "illustrative rather than restrictive." (*In re Cox*, 3 Cal.3d at 216.) See also *Marina Point*, 30 Cal.3d at 734, where the California Supreme Court explained:

> "As we pointed out in *Cox*, . . . from before the beginning of the twentieth century California's public accommodation statutes have uniformly proscribed the exclusion of individuals on the basis of purely arbitrary classifications."

Of course, sex discrimination is expressly prohibited in Unruh. See Cal. Stats. 1974, ch. 1193, § 1, p. 2568. Furthermore, sex discrimination is the only basis of discrimination at issue in the instant case. No question has been raised as to Rotary International's membership selection criteria except for the exclusion of all women, and no question has been raised as to whether selection criteria used by other organizations are arbitrary or justified.

Assuming, arguendo, that birdwatcher clubs or trial lawyer organizations may wonder whether they may, consistent with Unruh, limit their membership to persons who have spotted 100 birds or appeared in 100 trials, such speculation as to possible future Unruh applications does not

justify a void-for-vagueness attack on Unruh's prohibition of all arbitrary discrimination. Unruh expressly forbids sex discrimination, which is the conduct at issue herein. As explained in *Parker v. Levy*, 417 U.S. 733, 756 (1974):

> "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."

As further amplified in *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1982):

> "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

Since Unruh expressly forbids sex discrimination, and since sex discrimination is the only issue herein, this Court should not entertain appellants' argument that the term "arbitrary" is uncertain and does not give sufficient notice as to prohibited conduct.

### 2. California Courts, Like Federal Courts, Have Well-Defined Standards To Identify Arbitrary Discrimination.

As discussed above, Unruh codifies California's longstanding "common law doctrine that certain public enterprises are obliged to serve all without arbitrary discrimination." (*Isbister*, 40 Cal.3d at 78.) Because Unruh forbids not merely the enumerated bases of discrimination, but also all arbitrary discrimination, Rotary International claims the reach of Unruh is uncertain. This claim ignores the well-articulated standards developed in numerous California court decisions. Indeed, California's description of arbitrary discrimination is analogous to and consistent

with this Court's standard for identifying arbitrary discrimination which violates equal protection guarantees.[9]

The focus of Unruh, like equal protection, is that individuals must not be evaluated based upon generalized or stereotypical ideas as to group characteristics which may, in fact, not be true as to the particular individual. As the California Supreme Court has explained:

> "Though one may be excluded from a 'business establishment' on an individual basis 'if he conducts himself improperly or disrupts the operations of the enterprise,' it is 'arbitrary,' and therefore prohibited, to exclude *an entire class* on the basis of stereotyped notions." (*Isbister*, 40 Cal.3d at 87, citing *Marina Point*, 30 Cal.3d at 738-739, and *In re Cox*, 3 Cal.3d at 217-218.) (Emphasis by Court.)

The same rejection of class-wide exclusions and stereotypes permeates equal protection analysis. For example, as this Court warned in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-725 (1982):

> "[Gender-based classifications] must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."

Indeed, descriptions of the equal protection guarantee, with its mandate of equal treatment of similarly-situated individuals and its rejection of group stereotypes are

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9. Equal protection violations, unlike Unruh violations, require state action, but for purposes of analyzing appellants' claim that "arbitrary" is an unintelligible term, this distinction is irrelevant.

equally descriptive of Unruh's guarantee. According to one eminent constitutional scholar:

> "The substantive core of the [fourteenth] amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by organized society as a respected, responsible, and participating member." (Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 Harv.L.Rev. 1, 4 (1977).)
>
> "In its most typical application, the principle of equal citizenship will operate to prohibit the society from inflicting a 'status-harm' on members of a group because of their group membership." (*Id.*, at 8.)

See also Rotunda, Nowak, Young, *Treatise on Constitutional Law*, Vol. 2, 317 (1986). (Equal protection guarantees that "classifications will not be based on impermissible criteria or arbitrarily used to burden a group of individuals.")

California courts have similarly described Unruh as requiring that individuals not be classified based upon group stereotypes. As explained in *Marina Point*, 30 Cal.3d at 740:

> "[T]he exclusion of individuals from places of public accommodation or other business enterprises covered by the Unruh Act on the basis of class or group affiliation basically conflicts with the individual nature of the right afforded by the act of access to such enterprises. As the United States Supreme Court observed in reaching a similar conclusion with respect to the antidiscrimination provisions of title VII of the federal Civil Rights Act of 1964 . . . '*Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.*' (Italics added.)

> "As *Cox* makes clear, of course, under the Unruh Act exclusion on the basis of a group classification is as improper when applied to 'children' or 'families with children' as it is when applied to occupational, racial, religious or other broad 'status' classifications."

See also *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal.App.3d 712, 733 (1983). ("[T]he statute's focus on the individual precludes the exclusion of persons based on a generalization about the class to which they belong.")

Further support for the fact that the term "arbitrary" is a term with "a reasonable degree of clarity" (*Jaycees*, 468 U.S. at 629) is the fact that this Court has itself used the term on numerous occasions in decisions evaluating those equal protection claims which are not presumptively invidious. See *Bowen v. Owens*, — U.S. — [106 S.Ct. 1881, 1985] (1986); *City of Cleburne v. Cleburne Living Center*, — U.S. — [105 S.Ct. 3249, 3258] (1985); *Hodel v. Indiana*, 452 U.S. 314, 332 (1981); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *San Antonio School District v. Rodriquez*, 411 U.S. 1, 53 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); and *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Indeed, one of the most frequently quoted descriptions of the equal protection guarantee begins with the admonition that "the classification must be reasonable, not arbitrary, . . ." (*Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).)

Given this close similarity between Unruh and equal protection in their prohibition of arbitrary classifications and rejection of group stereotypes, it is not surprising that many of the same classifications determined to be arbitrary under Unruh have also been found to violate equal protec-

tion where the classification is unrelated to any legitimate or reasonable concern. Arbitrary sex classifications are, of course, unconstitutional, as well as unlawful under Unruh. See *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), and cases cited therein.

Arbitrary classifications based upon a person's sexual orientation or homosexual status are prohibited under Unruh. (*Curran*, 147 Cal.App.3d at 734; *Rolon v. Kulwitzky*, 153 Cal.App. 3d 289, 292 (1984); and *Stoumen v. Reilly*, 37 Cal.2d 713, 716 (1951). Such classifications also may violate equal protection if unrelated to any legitimate purpose. *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458, 475 (1979); *Scott v. Macy*, 349 F.2d 182, 184 (D.C. Cir. 1965); *Gay Students Org. of U. of New Hampshire v. Bonner*, 367 F.Supp. 1088, 1101 (D.N.H. 1974), aff'd on other grds. 509 F.2d 652 (1st Cir. 1974); and *Rowland v. Mad River Local School District*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting.)

Similarly, discrimination on the basis of age may violate Unruh (*Marina Point*, 30 Cal.3d at 740), and is also subject to the arbitrary standard of review under equal protection. (*Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); and *Vance v. Bradley*, 440 U.S. 93, 97 (1979).)

As a final example, grooming standards are also subject to the arbitrary standard of review under both Unruh (*In re Cox*, 3 Cal.3d at 217-218) and equal protection (*Hander v. San Jacinto Junior College*, 519 F.2d 273, 276 (5th Cir. 1975); and *Lansdale v. Tyler Junior College*, 470 F.2d 659, 664 (5th Cir. 1972).)

As these cases demonstrate, Unruh, like the equal protection clause, prohibits arbitrary classifications unrelated to legitimate purposes. Group status unrelated to the purpose of the classification may not be used to exclude entire groups of persons.[10]

Unruh's prohibition of arbitrary classifications does not, of course, mean that all classifications are unlawful. Again, consistent with equal protection analysis, Unruh only requires that the criteria used to distinguish one individual from another be reasonably related to the purpose of the selection and not based on bias or prejudice. Reasonable classifications recently upheld under Unruh include limiting access to funerals to those invited (*Ross v. Forest Lawn Memorial Park*, 153 Cal.App.3d 988, 993 (1984), and excluding compulsive gamblers from gambling clubs (*Wynn v. Monterey Club*, 111 Cal.App.3d 789, 797 (1980) ("The overriding issue is always whether the denial of access to public accommodation is based on race, sex, religion or other arbitrary and unjustified basis.").)

The prohibition of arbitrary discrimination therefore does not mean, as appellants suggest, that all selectivity is unlawful, but only that group stereotypes may not be used as a shortcut for legitimate individual assessments. Where distinctions among individuals are justified by legitimate factors related to those individuals, classifications or exclusions based on those distinctions are perfectly lawful

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10. Appellants' argument that Unruh's failure to cover physical handicap discrimination is evidence of the uncertainty of "arbitrariness" ignores the fact that California deals with such arbitrary discrimination under a separate statute. See California Civil Code section 54.1, and *Marsh v. Edwards Theatres Circuit, Inc.*, 64 Cal.App.3d 881, 890 (1976).

under Unruh. Nothing in Unruh requires an association of community and business leaders, formed to create a network among such leaders, to open its doors to persons who do not satisfy reasonable membership criteria. Again, the parallel to equal protection is sound. As explained in *Karst*, 91 Harv.L.Rev. at 11, "The principle of equal citizenship is not a charter for sweeping economic [or social] leveling."

Just as courts have been able to distinguish legitimate classifications from arbitrary classifications under equal protection guarantees, California courts have outlined the nature of classifications which comply with Unruh. These decisions satisfy any concern that Unruh's prohibition of arbitrary discrimination is unconstitutionally vague.

### 3. California Courts Have Established Criteria To Identify Enterprises Covered by Unruh.

California courts have construed the phrase "all business establishments of every kind whatsoever" so that those enterprises subject to Unruh may readily be identified, even though the phrase is "unique among the states" which have comparable civil rights laws. (Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Application*, 33 So. Cal. L.Rev. 260, 262 (1960).)

As discussed above, Unruh now codifies California's common law doctrine that enterprises affected with a public interest may not discriminate arbitrarily. (*In re Cox*, 3 Cal.3d at 212.) Prior to the enactment of Unruh in 1959, California's codification of this common law doctrine used the more typical term "places of public accommodation,"[11]

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[11] Cal.Stats. 1897, ch. 108, § 1, p. 137; Cal.Stats. 1919, ch. 210, § 1, p. 309; and Cal.Stats. 1923, ch. 235, § 1, p. 485.

but a series of erratic court decisions[12] resulted in "fortuitous and inconsistent applications of the statute." (Horowitz, *The 1959 . . . Statute*, 33 So. Cal.L.Rev. at 276.) The phrase used in Unruh was a legislative response to these inconsistent cases. As explained by the California Supreme Court:

> "[T]he Unruh Act was adopted out of concern that the courts were construing the 1897 public accommodations statute too strictly." (*Isbister v. Boys' Clubs*, 40 Cal.3d at 78.)

See also *In re Cox*, 3 Cal.3d at 214.

In construing the coverage of Unruh, courts have therefore recognized that Unruh was intended to continue the existing coverage of all places of public accommodation and places affected with a public interest as well as to broaden or extend the reach of the former statute to every business-like enterprise. See *Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 471 (1962); *O'Connor v. Village Green Owners Assn.*, 33 Cal.3d 790, 793-794 (1983); *Marina Point*, 30 Cal. 3d at 731; *Swann v. Burkett*, 209 Cal.App.2d 685, 690 (1962); and 34 Ops. Cal. Atty. Gen. 230, 231-232 (1959).

Consequently, relying upon statutory history, California courts have held that at least all [illegible] places of public

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12. Compare *Long v. Mountain View Cemetery Assn.*, 130 Cal.App.2d 328 (1955) (cemetery not covered), *Coleman v. Middlestaff*, 147 Cal.App.2d Supp. 833 (1957) (dentist's office not covered), and *Reed v. Hollywood Professional School*, 169 Cal.App.2d Supp. 887 (1959) (school not covered), with *James v. Marinship Corp.*, 25 Cal.2d 721 (1944) (union covered), *Evans v. Fong Poy*, 42 Cal.App.2d 320 (1941) (saloon covered), *Suttles v. Hollywood Turf Club*, 45 Cal.App.2d 283 (1941) (racetrack covered), and *Lambert v. Mandel's of California*, 156 Cal.App.2d Supp. 855 (1957) (shoe store covered).

accommodation previously covered by former Civil Code section 51 are still covered by Unruh. For example, in *Isbister*, the Boys' Clubs was held to be subject to Unruh because "the Boys' Club of Santa Cruz is a 'place of public accommodation or amusement,' and thus a 'business establishment' covered by the Act." (*Isbister*, 40 Cal.3d at 81.) See also *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal.App.3d 712, 732 (1985).

Statutory history has also been relied upon by the courts to reject the contention that Unruh only covers businesses organized for profit. The fact that language exempting coverage of nonprofit groups was eliminated from Unruh but included in other civil rights legislation enacted during the same legislative session has been held to be evidence that such nonprofit groups are to be included under Unruh. See *Isbister*, 40 Cal.3d at 84-85; *Curran*, 147 Cal. App.3d at 732. The Legislature's elimination of other restrictive language or specific references to particular businesses has also been viewed as an intent to ensure broad coverage. (*O'Connor*, 33 Cal.3d at 795; *Pines v. Tomson*, 160 Cal.App.3d 370, 385 (1984).)

California courts have also turned to ordinary dictionary definitions to construe the coverage of Unruh. As stated in an early decision:

> "The Legislature used the words 'all' and 'of every kind whatsoever' in referring to business establishments covered by the Unruh Act (Civ. code, § 51, and the inclusion of these words, without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term 'business establishments' was used in the broadest sense reasonably possible. The word 'business' embraces everything about which one can be employed, and it is often

> synonymous with 'calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain.' (See *Mansfield v. Hyde*, 112 Cal.App.2d 133, 137 [245 p.2d 577]; 5 Words and Phrases (perm. ed. 1940) p. 970 et seq.) The word 'establishment,' as broadly defined, includes not only a fixed location, such as the 'place where one is permanently fixed for residence or business,' but also a permanent 'commercial force or organization' or 'a permanent settled position (as in life or business.') (See Webster's New Internat. Dict. (2d ed. 1957) p. 874; *id.* (3d ed. 1961) p. 778.)" (*Burks v. Poppy Construction Co.*, 57 Cal.2d at 468-469.)

See also *O'Connor v. Village Green Owners Assn.*, 33 Cal. 3d at 795.

The "business establishment" language has also been construed to cover groups with "sufficient businesslike attributes" or a "businesslike purpose." (*O'Connor*, 33 Cal.3d at 796.) Factors such as number of persons employed, physical facilities maintained, fees charged, advertising solicited or sold, collection of royalties, and the performance of other "customary business functions" may identify an organization as a business establishment. (*Ibid.*; see also *Curran*, 147 Cal.App.3d at 730; *Pines v. Tomson*, 160 Cal.App.3d at 386; and *Rotary Club*, 178 Cal. App.3d at 1051-1055.)

The coverage of private nonprofit organizations with businesslike attributes has been held to be "[c]onsistent with the Legislature's intent to use the term 'business establishments' in the broadest sense reasonably possible (*Burks v. Poppy Construction Co., supra*, 57 Cal.2d at p. 468), . . ." (*O'Connor*, 33 Cal.3d at 796.) Broadly defined, the term "business" includes both commercial operations

and noncommercial entities which are public accommodations or affected with a public interest or which have businesslike attributes. (*Pines v. Tomson*, 160 Cal.App.3d at 385-386; and *Curran*, 147 Cal.App.3d at 728.)

These two branches of noncommercial coverage—for enterprises with "sufficient businesslike attributes" or enterprises "affected with a public interest"—give definition to the phrase "all business establishments of every kind whatsoever," as applied to nonprofit organizations. Court decisions therefore defeat appellants' claim that Unruh is unconstitutionally vague.

### B. California Courts Have Construed Unruh So As To Avoid Its Application To Constitutionally Protected Conduct.

Appellants also allege that Unruh is unconstitutionally overbroad and might place impermissible restrictions on activities protected under the First Amendment, but California courts have limited Unruh's application so as to safeguard conduct worthy of First Amendment protection. No basis exists to invalidate the state statute as substantially overbroad.

The First Amendment overbreadth doctrine is an exception to the "traditional rule" that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. (*New York v. Ferber*, 458 U.S. 747, 767 (1982).) See also *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). This exception exists because of the chilling effect statutes susceptible to unconstitutional application

may have upon activity constitutionally protected by the First Amendment. (*New York v. Ferber,* 458 U.S. at 768-769.)

Because the overbreadth doctrine is contrary to the usual rule that federal courts will not litigate hypothetical cases (*New York v. Ferber,* 458 U.S. at 768), the doctrine has been described as "strong medicine" (*Broadrick,* 413 U.S. at 613; *New York v. Ferber,* 458 U.S. at 769), and the statute's overbreadth must be substantial before invalidation is justified. This is particularly true where, as here, the government is seeking to control conduct reflecting legitimate state interests, not to interfere with protected First Amendment activity. As explained in *Broadrick,* 413 U.S. at 615:

> "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

Furthermore, as with the void-for-vagueness doctrine, a statute will not be declared unconstitutionally overbroad if the law has been construed so as to avoid unconstitutional applications.

> "If the invalid reach of the law is cured, there is no longer reason for proscribing the statute's application to unprotected conduct." (*New York v. Ferber,* 458 U.S. at 769 n.24.)

The overbreadth doctrine thus serves "a valuable institutional purpose: It allows state courts the opportunity to construe a law to avoid constitutional infirmities." (*Id.,* at 768.)

California courts have construed Unruh to avoid infringement of constitutionally protected rights. In *Pines v. Tomson,* where Unruh was applied to the commercial activities of the publishers of a business directory, the Court ruled that Unruh prohibited a "born-again Christian" requirement for advertisers, and yet upheld the publisher's claim that Unruh could not constitutionally be applied to regulate discriminatory statements of editorial opinion. As the Court stated:

> "[A]ppellants' views, as opposed to its discriminatory practices, are entitled to protection under the free speech guarantees of the California and United States Constitutions." (*Pines v. Tomson,* 160 Cal. App.3d at 393.) (Footnote omitted.)

The Court carefully distinguished between secular, commercial activities and constitutionally protected rights of expression. (*Id.*, at 388-395.) Similarly, in *James v. Marinship Corp.*, 25 Cal.2d at 736, the California Supreme Court noted that the statutory predecessor to Unruh did not prevent unions from excluding persons with "interests inimical to the union . . . ."

California decisions have also carefully defined the reach of Unruh so as to exclude coverage of strictly private associations constitutionally protected under the right of intimate association described in *Jaycees.* For example, in *Isbister,* 40 Cal.3d at 84 n.14, the Court stated:

> "[T]he statute does not govern relationships that are truly private—to paraphrase Horowitz' words, those which are 'continuous, personal, and social' (33 So.Cal.L.Rev. at p.281) and take place more or less outside 'public view.' (*Id.*, at pp. 287, 289)."

Similarly, in *Curran*, 147 Cal.App.2d at 731, the court recognized that "*strictly* private clubs" are constitutionally protected, adopting the same analysis as developed under Title II of the Civil Rights Act of 1964, 42 United States Code sections 2000a *et seq.*, to evaluate whether the Constitution restricted application of Unruh. As explained therein:

> "Since the essence of a private club or organization is exclusivity in the choice of associates, we find this approach ensures that private organizations remain protected. However, those entities which are not in fact private must comply with the mandate of the Unruh Act." (*Ibid.*)

The same limitations as to the reach of Unruh were expressed in the decision under review herein. As stated in *Rotary Club*, 178 Cal.App.3d at 1059:

> "While there is personal and social interaction among Rotarians, the commercial aspects of the relationship clearly preclude a conclusion that they are 'truly private.' "

Appellants' claim of substantial overbreadth is further weakened by Unruh's focus on regulating conduct, not expression. Arbitrary discrimination may not be used to deny entitlement to full and equal "accommodations, advantages, facilities, privileges, or services." These words demonstrate Unruh's concern with regulating conduct towards other persons, as opposed to speech itself.

As a final matter, facial invalidation on the ground of overbreadth is not appropriate where, as here, the statute unquestionably may be constitutionally applied to a wide range of situations. See *Parker v. Levy*, 417 U.S. 733, 760 (1974). Appellants cannot and do not deny that there

are "a substantial number of situations to which [the statute] might be validly applied." (*Ibid.*)

Given the language of Unruh, and the careful attention California courts have paid to safeguarding constitutionally protected rights, appellants' mere speculation that Unruh might deter persons from engaging in constitutionally protected activities does not justify invalidation of the entire statute as overbroad.

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## CONCLUSION

For the foregoing reasons, the decision below should be either summarily affirmed for lack of jurisdiction or affirmed as properly applying constitutional standards. The Court of Appeal correctly construed and applied Unruh within constitutional limits, and no basis exists to set aside the decision below.

Respectfully submitted,

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